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Supreme Court of the United States

OCTOBER TERM, 1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK.

BRIEF FOR BYRON CLARK, JR., AS EXECUTOR, RESPONDENT

BYRON CLARK,
ANTHONY J. CAPUTO,
Counsel for Byron Clark, Jr.,
as Executor, Respondent.

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The history of this litigation is set forth adequately and correctly in Petitioner's Brief and will not be repeated here. Byron Clark, Jr., as Executor, although a Respondent, takes the same position before this Court as the Petitioner and joins in his prayer that the order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York County entered thereon be reversed.

The Question Presented

The question presented on this appeal is whether Section 124 of the New York Decedent Estate Law which

requires the Surrogate, except where the testator otherwise directs in his will, to apportion the federal estate tax among the persons interested in the estate, is in such conflict with Section 826(b) of the Internal Revenue Code which provides that the federal estate tax, unless otherwise directed in the will, is to be paid out of the estate before distribution, as to violate the Constitution of the United States.

Summary of Argument

This Respondent respectfully contends that there is no such conflict between Section 124 of the New York Decedent Estate Law and the Federal Estate Tax Law as to bring into operation the supremacy clause of the Federal Constitution. He contends that both laws may operate without substantial conflict in this case as they have in thousands of prior cases and that the alleged conflict is non-existent. He further says that if there is any question as to conflict, the provisions of Section 826(b) of the Internal Revenue Code specifically recognize the right of the several states to fix or alter the ultimate incidence of the tax.

POINT I

Section 124 of the New York Decedent Estate Law does not conflict with Section 826(b) of the Internal Revenue Code and does not violate the supremacy clause of the Constitution of the United States.

In *Matter of del Drago*, 287 N. Y. 61, the Court of Appeals by a bare majority construed the Federal Estate Tax Law as exacting a tax payable out of the net residuary estate, in the absence of a provision in the will directing payment from another source. Based on this construction the majority of the Court held that Section 124 of the

Decedent Estate Law was in conflict with Section 826(b) of the Internal Revenue Code in so far as Section 124 provides that the Surrogate must apportion the Federal Estate Tax among the several persons interested in the estate, even though there is no provision in the will directing such apportionment. Consequently, the State Court held that the statute was repugnant to Article Six, Clause Two of the Constitution of the United States which provides that the laws of the United States shall be the supreme law of the land.

Section 826(b) of the Internal Revenue Code provides in part that

> "* * * it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution".

Section 124 of the New York Decedent Estate Law provides as follows:

> "Whenever it appears from any accounting, * * * that an executor * * * *has paid* a death tax levied * * * under the provisions of the United States revenue act * * * the amount of the tax *so paid*, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues". (Italics ours.)

It will be noted that the Surrogate is directed *after the payment* of the Federal Estate Tax to equitably apportion the amount of the tax among the beneficiaries if the will is silent as to who shall bear the burden of paying said tax.

At 287 N. Y. 61, at Page 77 (R. 73) the majority of the Court of Appeals said

> "The federal acts place the incidence of the tax upon the **net residuary estate** payable by the executor be-

fore distribution *without recourse to the individual legatees.*"

(Italics supplied by Court—black face type ours.)

The error in the opinion of the majority of the Court lies in the statement that the estate tax is payable out of the *net residuary estate* and without recourse to the several legatees. The *net residuary estate* is that which remains after the authorized deductions set forth in Section 812 of the Internal Revenue Code and the legacies are deducted from the gross estate. Congress did not intend that the estate tax was to be exacted from this entity and has expressly stated that the tax was to be levied on the *net estate* which means the gross estate less the amount of the authorized deductions only. In other words, the difference between "net estate" and "net residuary estate" is that the former is the estate before payment of legacies and the latter the estate remaining after payment of the legacies.

Section 810 of the Internal Revenue Code provides that the tax is imposed on

> "* * * the transfer of the net estate of every decedent, citizen or resident of the United States * * *".

Section 930 of the Internal Revenue Code provides that

> "The term 'net estate' means the net estate as determined under the provisions of Section 812 or 861: * * *".

Section 812 of the Internal Revenue Code contains no provision for the deduction of legacies in arriving at the entity constituting the "net estate". The decision of the Court of Appeals to the effect that the tax is payable out of the "net residuary estate" in effect distorts the method of exacting the tax as enacted by Congress, since it necessarily contemplates that legacies are to be deducted before the tax is computed. Section 861 deals with deduction allowed to nonresidents and therefore immaterial for our purposes.

In addition to violating the express direction of Congress, the contention of the majority of the Court of Appeals would saddle the entire burden of the tax upon the recipients of the residuary estate who are usually the main objects of the testator's bounty. In such event, it is not improbable that in many cases the residuary estate would be seriously depleted or even wiped out after the taxes have been paid solely from this source.

The Court of Appeals committed further error when it stated that there could be no recourse to the legatees for payment of their proportionate share of the tax, There is nothing in the federal statute which warrants such a conclusion.

In cases where the legacies are large, the residuary estate may not suffice to pay the federal tax yet it could not be contended that because of the lack of funds in the residuary estate, payment of the estate tax could be avoided. The only alternative is recourse to the legatees. In his dissenting opinion Judge Desmond pointed out that this would be done even in the absence of any direction in a statute directing apportionment as a measure of intelligent administrative procedure. At page 83, he said

> "Even without a state prorating statute, there are cases where mathematically, the tax cannot be paid out of the residue, but must be charged immediately on the several bequests or devises. Suppose a case where there is no residue, as where the general legacies equal or exceed the actual net estate. In such a case the executor, paying the federal tax from the 'net estate', is in fact deducting it from the amount available for the general legacies. Would he then not have to prorate it against those legacies, whether or not any statute so directed?"

The federal statute directs payment out of the net estate when the testator does not direct otherwise. The statute does not directly or indirectly prohibit the several states

from setting up a system of apportionment among the persons interested under the will after the tax has been paid by the executor. The apportionment is necessarily made after the tax has been collected by the federal government at which time the purpose of the Congress to raise revenue has already been fulfilled. The entire proceeding thereafter involves the distribution of the estate by the executor, which function this court has repeatedly held to be a matter of state regulation.

Section 124 in operation does not interfere with the sovereign right of the Congress to collect an estate tax nor does it limit or abridge the manner selected by Congress. It does not alter the method of assessment or the levying of the tax, and does not conflict with the provisions of the federal statute which place the tax upon the net estate as a unit.

It has been settled by repeated decisions of this Court that before a state statute will be declared unconstitutional on the ground of conflict with a federal statute, the two must be in such irreconcilable conflict that both cannot stand together.

In *Kelly* v. *State of Washington*, 302 U. S. 1, this Court said at page 10:

> "The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' * * *".

This Court has recognized the presumption that every state statute is constitutional, and that before the sentence of nullification is pronounced every possibility of constitutionality must be excluded.

Corporation Commission of Oklahoma v. *Lowe*, 281 U. S. 431, 438.

Judged by the above test and benefited by the foregoing presumption, the New York Statute is clearly constitutional. The pragmatic test of time and the actual operation of this statute since 1930 is some indication that the alleged conflict herein is non-existent.

POINT II

Congress levied the tax on decedents' estates without regard and with complete indifference to the ultimate incidence of the Estate Tax.

The existence of the provision in Section 826(b) of the Internal Revenue Code recognizing the right of a testator to specifically indicate the persons by whom the burden of the tax is to be borne shows that Congress was not interested as to the ultimate incidence of this tax.

Congress derives its sole power in the premises from the revenue raising provisions of the Constitution in Article one, Section Eight, since there is no specific provision in the Constitution delegating to Congress any power of the regulation of estates. The strained basis of unconstitutionality adopted by the Court of Appeals would extend the power of Congress to levy a tax on decedents' estates to the field of regulating the distribution of decedents' estates. We do not believe that Congress had any intention of invading such doubtful territory when no need for such action existed.

This Court has affirmed and reaffirmed recently the rule that the power to control decedents' estates is vested exclusively in the several states and that the right of a testator to provide for distribution of his estate is derived from the state.

New York Trust Co. v. *Eisner*, 256 U. S. 345;
Irving Trust Co. v. *Day*, 314 U. S. 556.

Conclusion

The order of the Court of Appeals of the State of New York and the order of the Surrogate's Court of New York County entered on the remittitur of the Court of Appeals should be reversed.

Dated, October 8, 1942.

Respectfully submitted,

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as Executor, Respondent.